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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MIDDLESEX COUNTY UTILITIES AUTHORITY
(formerly Middlesex County Sewerage Authority),

Petitioner,

v.

CITY OF NEW BRUNSWICK, BOROUGH OF MILLTOWN and THE UNITED STATES OF AMERICA, by and through its ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Questions Presented for Review

1. Whether the user charge system prerequisite for federal sewer construction grants to public sewerage agencies under the Federal Water Pollution Control Act of 1972 (FWPCA), 33 *U.S.C.* §1284(b)(1)(4), properly construed, justifies a curtailment by the United States Environmental Protection Agency (EPA) of grant funds otherwise approved, to a regional public sewerage agency, notwithstanding the grantee secures adoption of a proper user charge system for all its 25 municipal participants, solely because a very small non-participating municipality has no user charge system for the reason that it has a long-standing binding contract with a participating municipality for the treatment of its sewage free of charge as a result of which the sewage of both municipalities is treated by the grantee at the expense only of the participating municipality.

2. Whether, in the circumstances recited in Question 1, it makes any difference that the grantee agency has joined in and supports state court litigation brought by the participating municipality to have the said contract set aside and the other municipality ordered to pay for its sewage treatment and to adopt a user charge ordinance.

3. Whether the purpose and intent of 33 *U.S.C.* §1284 (b)(1)(4), in requiring as a condition of a federal construction grant the adoption by the grant "applicant" of a system of user charges, is not qualified by the inability, legal or otherwise, of the applicant to effect such a system to the extent of 100 per cent, and whether the statute is not satisfied by substantial performance of such a condition within all the applicant's participant municipalities notwithstanding failure to effect it in a very small non-participating but sewage-contributing municipal-

ity because of absence of legal power of the applicant or its municipal participants to do so.

4. Whether, in the circumstances set forth in Questions 1, 2 and 3 a regulation adopted by EPA having the effect of denial of disbursement of 20 per cent of the approved grant money to the grantee is invalid because contrary to the underlying purpose and intent of the FWPCA to eliminate water pollution by means inclusive of massive federal grants to public sewerage agencies to enable construction of efficient waste treatment plants and upgrade existing ones.

5. Whether, assuming that EPA has general discretion to withhold grant funds for absence of a user charge system in any municipality whose wastes enter the grantee system, it is an abuse of agency discretion and arbitrary, capricious and unreasonable to withhold grant funds to the applicant in the circumstances set forth in Questions 1, 2 and 3.

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Opinions Below

The opinion of the Court of Appeals, filed July 22, 1982, is as yet unreported (Milltown, p. 1a et seq.).* The opinion

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* References herein to the opinions and judgments below will be by citation to the appendix to the petition for certiorari being filed in this matter by the Borough of Milltown (*e.g.*, Milltown, p. a).

of the District Court, filed August 11, 1981, is reported in 519 *F. Supp.* 878 (D.N.J. 1981) (Milltown, p. 33a et seq.). The judgments of those courts are set forth in the Milltown appendix, p. 30a and p. 53a, respectively.

Jurisdiction

Jurisdiction of this Court is pursuant to 28 *U.S.C.* §1254. Jurisdiction of the Court of Appeals was pursuant to 28 *U.S.C.* §1291. The jurisdiction of the District Court was based upon 28 *U.S.C.* §1331 and 28 *U.S.C.* §1441.

Statutes and Regulations

The statute here involved is 33 *U.S.C.* §1284(b)(1) and (4) [1982 Supp.] It reads as follows:

> §1284 (b)(1) Notwithstanding any other provision of this subchapter, the Administrator shall not approve any grant for any treatment works under section 1281(g)(1) of this title after March 1, 1973, unless he shall first have determined that the applicant (A) has adopted or will adopt a system of charges to assure that each recipient of waste treatment services within the applicant's jurisdiction, as determined by the Administrator, will pay its proportionate share (except as otherwise provided in this paragraph) of the costs of operation and maintenance (including replacement) of any waste treatment services provided by the applicant; and (B) has legal, institutional, managerial, and financial capability to insure adequate construction, operation, and maintenance of treatment works throughout the applicant's jurisdiction, as determined by the Ad-

ministrator. In any case where an applicant which, as of December 27, 1977, uses a system of dedicated ad valorem taxes and the Administrator determines that the applicant has a system of charges which results in the distribution of operation and maintenance costs for treatment works within the applicant's jurisdiction, to each user class, in proportion to the contribution to the total cost of operation and maintenance of such works by each user class (taking into account total waste water loading of such works, the constitutent elements of the wastes, and other appropriate factors), and such applicant is otherwise in compliance with clause (A) of this paragraph with respect to each industrial user, then such dedicated ad valorem tax system shall be deemed to be the user charge system meeting the requirements of clause (A) of this paragraph for the residential user class and such small non-residential user classes as defined by the Administrator. In defining small non-residential users, the Administrator shall consider the volume of wastes discharged into the treatment works by such users and the constituent elements of such wastes as well as such other factors as he deems appropriate.

• • •

(4) A system of charges which meets the requirement of clause (A) of paragraph (1) of this subsection may be based on something other than metering the sewage or water supply flow of residential recipients of waste treatment services, including ad valorem taxes. If the sytems of charges is based on something other than metering the Administrator shall require (A) the applicant to establish a system by which the necessary funds will be available for the proper operation and maintenance of the treat-

ment works; and (B) the applicant to establish a procedure under which the residential user will be notified as to that portion of his total payment which will be allocated to the cost of the waste treatment services.

The regulations of EPA involved are lengthy and are set forth in the appendix hereto (pp. 1a *et seq.*). They are 40 C.F.R. §35.929-1, §35.929-2(e), (g) and §35.935-13(a), (c).

Statement of the Case

Statement of Facts

Petitioner Middlesex County Utilities Authority (MCUA) is a New Jersey public body, having statutory authority for the regional treatment of waste water of such municipalities as choose to participate in it. For many years it has operated such a facility. At present there are 25 municipal participants, comprising a population of approximately 600,000. There are also 10 industrial participants. MCUA has in process a project for new lines designed for the improvement of its waste treatment system. It is now about 97 per cent complete. An application for federal funding was made to EPA in respect of this project.

The impetus for the institution of this construction project came from the Federal Water Pollution Control Act Amendments of 1972 ("FWPCA"), 33 *U.S.C.* §1251 *et seq.* The statute authorizes the setting of stringent new water pollution standards, applicable to public as well as private sources of waste water, by EPA and authorized state agencies under and pursuant to FWPCA. The objective of that statute was for complete purification of the nation's waters by 1985, 33 *U.S.C.* §1251(a)(1), and for

substantial progress in that direction by 1977. See *Milwaukee* v. *Illinois*, 451 *U.S.* 304, 310-311 (1981); *EPA* v. *State Water Resources Control Board*, 426 *U.S.* 200 (1976).

FWPCA contains generous provisions for funding of new or improved water treatment plants by public agencies, Congress realizing that the backlog of unmet waste treatment improvement projects could not be met by states and localities without massive federal aid. 33 *U.S.C.* §1281(a). See Senate Report No. 95-370 of the Committee on Environment and Public Works accompanying the bill which became the 1977 amendments of FWPCA. See 1977, 95th Cong. 1st Sess., 3 U.S. Code Cong. & Adm. News 4326, 4328, estimating the cost of eliminating the backlog in the construction of needed waste treatment public works at $60 billion, of which at least $45 billion would be required under then current grant policy.

MCUA applied to EPA for a grant toward construction of the lines construction project, and it was approved by EPA for the 75 per cent of cost allowed by law. 33 *U.S.C.* §1282(a)(1). The total cost of the project is $105,125,895 of which the EPA grant was $78,844,421. But EPA is holding back from MCUA over $9 million of the grant money now due for the following reason.

EPA asserts that MCUA is in default of a statutory condition for a grant, 33 *U.S.C.* §1284(b)(1)(4), that it procure the institution of user service charges by every contributor of waste within its jurisdiction. This is based on the absence of a user service charge in the Borough of Milltown, which has a contract going back to 1914 for the treatment of its waste by New Brunswick free of charge. New Brunswick is a participant in MCUA; Milltown is not. New Brunswick pays MCUA for treatment of the accumulated sewage of both New Brunswick and Milltown and itself has a satisfactory user charge system. But EPA as-

serts that Milltown must also adopt a sewer user charge ordinance in order for MCUA to qualify for its full grant. Under EPA regulations applicable to grants which had been approved prior to July 1, 1979, EPA asserts the right to withhold 20 per cent of a grant until the grantee effects adoption of user charge ordinances in all municipalities contributing waste to the grantee system. 40 *C.F.R.* §35.935.13(a) (p. 7a). As a result, if the position of EPA herein is sustained, MCUA will lose not only the $9 million plus withheld to date, but also the balance of the difference between the amount of the grant and the amount heretofore received by MCUA on account of the lines project—or a total loss of about $13.5 million.*

MCUA has done everything within its power to meet the EPA's requirement for the institution of a user charge system in every municipality contributing waste to its system. All 25 of its municipal participants with the exception of one,** have adopted user charge ordinances approved by

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* The impact of EPA's construction of the statute is dramatized by its regulation, 40 C.F.R. 35.935-13(c) (p. 8a), under which no grants in any percentage will be made on applications submitted after June 30, 1979 unless EPA has approved the user charge system of the grantee. This would have cost MCUA a $27 million federal grant for construction of a dewatering plant which MCUA had planned as part of a program for transferring disposition of sewage sludge from dumping in the ocean to land-based facilities. MCUA applied for a grant on that project, but the project is now inactive.

** The exception is the Borough of Sayreville, which has adopted a user charge system only for industries. It has refused to adopt such a system for residences. However, MCUA has obtained a state court judgment ordering Sayreville to comply with its agreement with MCUA to adopt a user charge ordinance satisfactory to EPA. Although Sayreville has appealed that judgment, MCUA considers the appeal frivolous and expects Sayreville shortly to come into compliance. Thus the Milltown situation is now the only realistic bar to release of MCUA's impounded funds.

EPA. MCUA is powerless to abrogate the 1914 contract between New Brunswick and Milltown under which New Brunswick undertook to handle Milltown's sewage without charge. The origin of that contract is described in *New Brunswick* v. *Milltown*, 3 N. J. Super. 113, 65 A. 2d 621 (App. Div. 1949), wherein the validity of the contract was sustained as against an effort by New Brunswick to have it declared of no further effect. A previous effort by New Brunswick to be relieved of the contract also met with failure. *New Brunswick* v. *Milltown*, 135 N. J. Eq. 310, 38 A. 2d 288 (Ch. 1944). Later New Brunswick joined the MCUA system.

New Brunswick has a user charge ordinance under which all users, industrial and domestic, are charged on the basis of flow, determined either by metered readings of sewage flow or by use of water consumption records. This concededly satisfies EPA requirements for a user charge system. The users in New Brunswick absorb the cost of treating the Milltown sewage by the incorporation of the latter in the gross New Brunswick flow the cost of which is apportioned to New Brunswick users under the approved New Brunswick user charge plan.

The *de minimis* extent of the Milltown contribution of waste to the New Brunswick-MCUA system is reflected by the fact that according to the 1980 census the population of Milltown is 7,136 and that of all municipalities contributing waste to the system is 599,640, or a ratio of 1.2 per cent. These are facts susceptible of judicial notice. F.R. Evid. R. 201(b).

The refusal of EPA to advance the balance of construction grant money due MCUA has seriously burdened MCUA by virtue of the consequent necessity to seek expensive interim financing to satisfy its obligations to contractors for construction work completed to date. Perma-

nent withholding of the grant money from MCUA would force MCUA into the public bond market to raise the additional $13.50 million which will have become due when construction is completed. This will place a serious and unanticipated additional burden on the municipal participants in the MCUA system.

The course of the litigation leading to the upholding of the position of EPA in the lower courts is adequtely detailed in the opinion of the Court of Appeals (Milltown, pp. 8-12a).

ARGUMENT

Petitioner advances the following reasons for the grant of certiorari.

I.

The determination of the Court of Appeals that the action of EPA does not contravene 33 U.S.C. §1284 (b) (1) (4) is erroneous and constitutes a decision of an important question of federal law which has not been, but should be, settled by this Court.

The importance of the federal sewer construction grant program in the attainment of the goal of purification of the nation's waters under FWPCA can hardly be overstated. The congressional declaration of goals and policy, 33 *U.S.C.* §1251, included the statements:

> "(a)(1) It is the national goal that the discharge of pollutants in the navigable waters be eliminated by 1985;
>
> • • •

> (4) It is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;"

A cogent statement of the close relationship of federal funding of municipal construction or improvement of sewerage plants to the objective of cleaning up the nation's waters is set forth in a footnote in *Train* v. *City of New York*, 420 U.S. 35, 45 (1975).

There are said to be some 30,000 local governmental sewerage agencies potentially eligible for federal construction grants, and Congress has recognized that many of them may have peculiarly unique legal and financial factors that should be taken into account by EPA in passing upon sewer user charge systems submitted to qualify for grants under Section 1284(b)(1)(4). Thus in proposing the requirement for user charge plans, the Senate Committee stated:

> Although the committee is aware of *the many different legal and financial circumstances* that characterize state and local governments and agencies throughout the country, the bill directs the Administrator to promulgate guidelines for the establishment and imposition of user charge systems as a guide to grant applicants for waste treatment works grants. These guidelines *should take into account the diversity of legal and financial factors that exist from jurisdiction to jurisdiction,* and each applicant should be permitted *reasonable flexibility* in the design of a system of user charges that meets *the unique requirements of his own jurisdiction.* As a general rule, the volume and character of each discharge into a publicly owned system should form the basis of determining the rate at which each user should be required to pay." (emphasis added).

2 U.S. Code Cong. & Adm. News (1972 92nd Cong. Sec. Sess.) p. 3668, 3695.

A.

The intent of Congress was for reasonable flexibility in the design of user charge systems. The EPA regulations negate the congressional objective of flexibility.

The lower courts unfortunately misread and misinterpreted the foregoing evidence available from the legislative history as to the congressional intent with respect to the user charge requirement. They recognized that flexibility in the design of sewer charge systems was required, but they failed to read the reference to flexibility in the committee report *in pari materia* with that concerning *"diversity of legal and financial factors"* in different jurisdictions. The New Brunswick-Milltown contract is clearly a "unique" legal and financial factor necessarily affecting any MCUA sewer user charge system, and it was plainly the intent of Congress that such a circumstance should be accommodated in any EPA guidelines governing a particular grant application. Since New Brunswick by contract assumes Milltown's sewage treatment free of charge, it defies reason to require payment of a user charge by Milltown's property owners. The view of the lower courts that in these circumstances EPA could justify denial of 20 per cent of the MCUA lines grant upon absence of a user charge in Milltown not only ignores the legislative committee admonition concerning unique legal and financial circumstances of a grantee but sanctions a narrow and irrational administrative approach to one section of the water pollution control legislation which undermines a major objective and *raison d'etre* of the statute as a whole—the reduction of water pollution by con-

struction and improvement of sewerage treatment facilities. If the statute authorizes withholding 20 per cent, it authorizes withholding 100 per cent. This seems unthinkable in terms of legislative intent applied to these facts.

MCUA has insisted upon the adoption of a satisfactory user charge system by every municipal participant in the system. Milltown is not a participant, but the users in New Brunswick are carrying, on a user charge basis, the cost of treating the Milltown sewage. Moreover, MCUA is doing whatever it can in the pending state-court litigation to assist New Brunswick in abrogating the Milltown contract to the end that Milltown also adopt a user charge system. MCUA is clearly in substantial compliance with the statute, sensibly construed.

B.

The statutory policy of financial stability underlying the requirement of user charge systems does not justify the manner of application of the requirement as imposed by EPA against MCUA.

EPA argues that the adoption of a user charge system by Milltown is an absolute condition for payment of the grant money to MCUA because there would otherwise be an impairment of the two alleged purposes of the statutory requirement: (a) achievement of economy of water and power through the incentives provided by user charges; and (b) making the grantee system financially self-sufficient afer construction of the new plant. We submit that the asserted economy-incentive purpose of the statutory requirement was not its real object and in any case has been largely dissipated by statutory amendments; and that the remaining true objective, *i.e.*, financial stability, is assured in the present circumstances.

Inspection of the legislative history indicates that the intent of Congress in providing for the user charge requirement was not at all that of incentive for economy by users but solely that of assuring financial security and stability of the grantee after construction. The only allusion in the Senate Committee report accompanying the 1972 bill as to the purpose of the user charge requirement was as follows:

> "Each system of user charges imposed pursuant to requirements of the bill must be designed in such a way as to generate sufficient revenues to operate and maintain the treatment works to which it applies.** The Committe bill anticipates that the agencies responsible for constructing and operating treatment works will, through the imposition of user charges, become financially self sufficient with respect to the operation and maintenance (including replacement as defined of treatment works) constructed with assistance pursuant to the Act."

1972, 92nd Cong. 2d Sess., 2 U.S. Code Cong. & Adm. News, 3668, 3695.

The 1977 report of the same committee corroborates the foregoing. After pointing out that prior to adoption of the 1972 statute a major problem "was the inability of the municipalities to sustain the cost of operation and maintenance of facilities constructed with federal grant money" because of the inadequacy of municipal budgets, etc. 1977, 95th Cong. 1st Sess., 3 U.S. Code Cong. & Adm. News, 4326, 4352, the Committee continued:

> "The concept of 'user charges' was originally proposed as a means of assuring that each federally assisted facility would have adequate operation and maintenance funds. In this way municipalities could

> employ their limited taxing powers in providing other forms of public services, and waste treatment facilities could be operated and maintained efficiently, thereby assuring adequate waste treatment services and a sound investment of federal dollars." (*Ibid.*)

The Committee went on to say that "further examination of the user charge concept revealed additional benefits", to wit, the encouragement of a more efficient management of wastes as well as economic inducement to reduce excessive use (*Ibid.*). The Committee was not, however, thereby indicating the *original purpose* of the user charge system but merely commenting on what might be deemed to be "additional benefits" *later perceived*. The lower courts were therefore in error in ascribing to Congress a twofold purpose in the user charge, *i.e.*, financial security *and* incentive against waste (Milltown, pp. 24a, 42a). The legislative history reveals that only the former motivated the adoption of the requirement.

Moreover, any economy-incentive aspect of the user charge system was largely downgraded by statutory amendments of the proviso in 1977 and 1980. Municipalities were permitted to create system whereby charges to residential and small industrial users could be based on ad valorem assessments and comparable measuring devices unrelated to volume of flow of water or sewage. Thus §1284 now provides:

> "(b) (4) A system of charges which meets the requirement of clause (A) of paragraph (1) of this subsection may be based on something other than metering the sewage or water supply flow of residential recipients of waste treatment services including ad valorem taxes".

The 1980 amendment of the section extends the permission to base the user charge system on an ad valorem basis to "such small non-residential user classes as defined by the Administrator". (See 1982 Supp. to 33 U.S.C. §1284). The intent, moreover, is to allow even charges "based on a flat fee per household or per plumbing fixture". 1977, 95th Cong. 1st Sess., 3 U.S. Code Cong. & Adm. News, 4326, 4351-4352.

In clear disagreement with the Court of Appeals that promotion of economy ranks with financial security as a legislative objective for the user charge requirement (Milltown, p. 24a) is the rationale in *Hotel Emp. Ass'n of San Francisco* v. *Gorsuch*, 669 F. 2d 1305, 1308 (Cir. 9 1982).

Insofar as concerns the true statutory object of requiring user charges—financial security of the grantee—the absence of user charges in Milltown does not disserve it one whit. New Brunswick's user charges against its own sewerage users carry the added costs of the Milltown load without threat of default, as they have been doing since 1914. There is not a remnant of evidence in this record for hypothesizing any threat to MCUA's financial stability in the Milltown situation, and the purported concern over it in the opinion of the Court of Appeals is but a strained makeweight for its decision. (Milltown, p. 24a, n. 18a). Far more of a threat to MCUA's financial welfare is EPA's withholding of the millions of dollars of undisbursed funds together with the resulting $1 million annual interest expense to MCUA on the additional construction debt.

C.

Milltown recipients of waste treatment services of MCUA are not within its "jurisdiction", within the intent of §1284 (b) (1) and therefore Milltown is not required to adopt a sewer user charge system.

The lower courts have agreed with EPA that the "recipients" in Milltown of the waste treatment services of MCUA *via* New Brunswick are within MCUA's "jurisdiction", as specified by the statutory language, and that therefore they must by a user charge system pay for such services (Milltown, p. 14a). The concept relied on is that "jurisdiction" means "territorial" jurisdiction and that the EPA Administrator reasonably so determined, as he was empowered to do by the statutory language. (*Ibid.*). Again, however, the lower courts have disregarded the contrary implications of the legislative history. As noted above, the Committee report directed that in fixing guidelines for user charge plans attention be given to different legal and financial circumstances affecting a grantee. It was thus plainly in mind that in the case of a regional agency grantee, existing contractual circumstances of a municipal participant might be such as to preclude payments by certain recipients of waste services. In that sense, the statutory references to "jurisdiction" must, as a functional matter, be taken to mean power to act rather than territorial jurisdiction. MCUA has no power to act to compel Milltown to adopt sewer charges because MCUA has no contract with Milltown. MCUA does have jurisdiction over New Brunswick, but no power through the latter to compel Milltown to do anything. The long standing contract of MCUA with New Brunswick as a participant in its system compels MCUA to treat Milltown's sewage so long as New Brunswick pays for it or until some court relieves New Brunswick of its ancient obligation to Milltown.

That the statute qualifies "jurisdiction" by the terms "as determined by the Administrator", does not render EPA's determination conclusive if unreasonable and not consistent with the purposes of the legislation. *Cf. Chrysler Corp.* v. *EPA*, 631 F. 2d 865, 884 (D.C. Cir), cert. den., 449 U.S. 1021 (1980). The determination is both unreasonable and inconsistent with the purposes of the statute. Congress wants sewer projects improved with federally granted funds. It cannot have been the intent of Congress to authorize EPA, with one hand, to make substantial construction grants to MCUA, and with the other hand, to take away a substantial portion of the grant for a condition MCUA is powerless to do anything about—and which in no way impairs MCUA's financial security.

Whether or not the foregoing definitional argument is accepted, it is apparent that MCUA has substantially performed the statutory condition of creation of a user charge system whereby users in all participating municipalities carry the financial burden of the total costs of operation and maintenance of MCUA's treatment plant, including costs attributable to Milltown (*via* the New Brunswick ratepayers). This constitutes adequate satisfaction of the legislative objective.

Nor should our position be rejected by reason of EPA regulation §35.929-2(e) (p. 6a). This recites that "If the project is a regional treatment system accepting wastewaters from other municipalities, the subscribers receiving waste treatment services from the grantee shall adopt user charge systems in accordance with section 204(b)(1) [§1284(b)(1)] of the Act and §§35.929 through 35.929-3. * * *." The key word here is "subscribers". Milltown is not a subscriber of MCUA. The use of the word "municipalities" in the next sentence of the regulation is not significant. That sentence is intended

only to require that user charge systems be incorporated in formal municipal legislation. The "municipalities" there referred to are the "subscribers" denominated in the substantive part of the regulation. See the additional references to "subscribers" in a regional system throughout regulation §35.929-1 (p. 1-5a).

If the regulation is not confined to subscribers of the grantee, it is invalid as in contravention of the statute pursuant to which the regulation was promulgated, the coverage of the statute being confined to "recipients" within the "jurisdiction" of the grantee. The coexistence of "jurisdiction" in the statute and "subscribers" in the regulation confirms our case for legislative intent.

D.

Deference to administrative expertise and discretion does not justify the decisions below since the action of EPA defies all indicia of legislative intent and purpose.

EPA and the lower courts have confined themselves to a hyper-literal reading of §1284(b)(1)(4) to the disregard or minimization of the obvious strong intent of Congress that water pollution be reduced by federally financed sewerage improvement projects, provided only that user charge systems be imposed by grantees assuring their financial security. MCUA has met that requirement. But a contrary conclusion has here been rested on the doctrine of reliance on the "deference" to be accorded to administrators' interpretation of regulatory statutes. (Milltown, pp. 12-13a). However, there is no rule of statutory construction more firmly established than that the letter of a statute must bow to its purpose and object as revealed by legislative his-

tory and all of the circumstances attendant upon enactment. *Steelworkers* v. *Weber*, 443 U.S. 193, 202 (1979) ("It is a 'familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers'"); *Muniz* v. *Hoffman*, 422 U.S. 454, 469 (1975); *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975); *Train* v. *Colorado Pub. Int. Research Group*, 426 U.S. 1, 10 (1976) ("'when aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on superficial examination'"); *United States* v. *American Trucking Association*, 310 U.S. 934, 943 (1940) ("even when the plain meaning [of statutory language] did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' [the court] has followed the purpose, rather than the literal words.")

We submit the result arrived at below meets all of the invidious characterizations just quoted.

Despite the principle that courts will ordinarily accord deference to administrative construction of statutes administered by such agencies, there has been no hesitation in judicial nullification of EPA regulations when contrary to plain statutory intent. *Natural Resources Defense Council Inc.* v. *Costle*, 568 F. 2d. 1369 (Cir. D.C. 1977); *Campaign Clean Water Inc.* v. *Train*, 489 F. 2d 492 (Cir. 4. 1973), vacated on other grounds, 420 U.S. 136 (1975); *Dobbs* v. *Costle*, 559 F. 2d. 946, 949-950 (Cir. 5. 1977). The same rule has been widely applied also in other administrative fields. *Southeastern Community College* v. *Davis*, 442 U.S. 397, 410-411 (1979); *Consolidated Rail Corp.* v. *United States*, 619 F. 2d. 988-993 (Cir. 3 1980); *Quinn* v. *Butz*, 510 F. 2d. 743 (Cir.

D.C. 1975). "[A]n [administrative] interpretation which emasculates a provision of a statute is not to be preferred * * *." *Marsano* v. *Laird,* 412 F. 2d. 65, 70 (Cir. 2 1969). Distinguish the situation where the court finds an agency's interpretation of the statute to be "reasonable", as in *EPA* v. *Nat'l. Crushed Stone Ass'n.,* 449 U.S. 64, 83-84 (1981).

It is recognized that a general administrative regulation may be appropriate providing the rule contains provision for "correction of injustices" under the rule by special application. See *National Nutriti. nal Foods Ass'n* v. *Food & Drug Admin.,* 504 F. 2d 761, 784 (Cir. 2 1974). In the present instance EPA has, by misreading legislative history, rigidified the statute by its regulations and failed to create an exception to avert the obvious injustice and perversion of the legislative intent represented by the plight of MCUA if denied its full grant in these circumstances.

II.

To the extent that the statute vests discretion in EPA in determining the adequacy of a user charge system, the action of EPA constitutes an abuse of discretion and is arbitrary, capricious and unreasonable.

In Point I of this argument we have contended that the regulations under whose purported authority EPA is withholding grant funds from MCUA are invalid because contrary to the intent and purpose of the enabling statute. We now contend, in the alternative, that to the extent that the statute reposes discretion in EPA for the adoption of regulations controlling user charge systems adopted by grant applicants, the exercise of such discretion by EPA in the present case is invalid because so arbi-

trary and unreasonable as to constitute an abuse of discretion under the attendant circumstances. 2 Davis, *Administrative Law Treatise* (1980) 7.8, 36; *Batterton* v. *Francis,* 432 U.S. 416, 425 (1977); *General Electric Co.* v. *Gilbert,* 429 U.S. 125, 141 (1976); *Starr* v. *Federal Aviation Administration,* 589 F. 2d. 307, 311 (Cir. 7 1979).

In the present case it is, of course, our contention that EPA's denial of grant funds to MCUA under its regulations ignored factors which Congress indicated were highly significant to its overall purpose of reducing pollution in the nation's waters: (a) to aid construction of improved municipal sewerage facilities by grants of funds and thereby work to eliminate pollution of waters; (b) to insure financial stability of grantees of federal construction funds; and (c) to allow for particular legal and financial circumstances of a grantee in passing upon the user charge system of the grantee. Moreover, EPA gave undue weight to the alleged economy-incentive aspect to the extent that it was (we contend it was not) a legislative object.

We incorporate by reference all of the substantive contentions made in Point I hereinabove demonstrating the egregious unreasonableness of denying MCUA the substantial grant funds yet due it on the insubstantial, arbitrary and *de minimis* basis assigned by EPA for its action.*

In summary:

1. Despite the absence of user charges in Milltown, user charges are in effect (subject to the enforcement of the Sayreville judgment, see p. 6 n.) as to almost 99 percent of the sewage flow of the MCUA system.

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* The imperilment of the MCUA grant over the New Brunswick-Milltown impasse recalls the plight of the monarch who lost a kingdom for lack of a nail to shoe his horse. Shakespeare, King Richard III, Act V, Scene IV.

2. Milltown is not a participant in or subscriber to the MCUA system.

3. The New Brunswick-Milltown contract has twice been upheld by the New Jersey courts.

4. MCUA has no power to impose a user charge system upon Milltown, but is supporting New Brunwick's litigative effort toward that end.

5. The absence of user charges in Milltown does not affect the financial security of the MCUA system since the users in New Brunswick are carrying the costs of treating Milltown sewerage.

6. The curtailment of grant funds to MCUA is a threat to achievement of its program for upgrading its sewage treatment facilities. It also subjects MCUA and its municipal participants to heavy and unanticipated additional financial burdens. It thus both tends to subvert MCUA's financial security and to thwart its compliance with the water pollution abatement objectives of vital federal environmental legislation.

It is accordingly submitted that to the extent that the action of EPA here impugned is sought to be justified by the exercise of administrative discretion, the agency action is invalid for arbitrariness, unreaonableness and abuse of discretion.

CONCLUSION

It is submitted that the Court should issue its writ to review the decision of the Court of Appeals to the end that this first-instance but important question of environmental law be settled by the Court. The narrow, unreasonable and incorrect interpretation by EPA of the grant provisions of FWPCA threatens seriously to undermine the legislative intent for federal financing of sewerage construction costs and thus an essential element of the program for purification of the nation's waters. The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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